

“Engaged in Business” Model Statute – Use Tax Option A

Retailer engaged in business in this state.

(a) Every retailer engaged in business in this state and making sales of [tangible personal property and/or taxable services*] for storage, use, or other consumption in this state, not otherwise exempt under this Act, shall register with the Department and at the time of making the sales, if the storage, use, or other consumption of the [tangible personal property and/or taxable services*] is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax required under this Act from the purchaser.

(b) “Retailer engaged in business in this state” as used in this section means any retailer, whether or not authorized to do business in this state, that has a sufficient connection under the Constitution of the United States with this state to be subject to use tax collection duties. “Retailer engaged in business in this state” specifically includes, but is not limited to, any of the following:

(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a related party, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business in this state.

(2) Any retailer having, permanently or temporarily, any employee, representative, agent, salesperson, independent contractor, or any other person operating on the retailer’s behalf. This includes a person operating in this state under the authority of the retailer or a related party for the purpose of selling, delivering, installing, assembling, performing maintenance or repair services for the retailer’s purchasers in this state, or the taking of orders for [tangible personal property and/or taxable services*] sold by the retailer, or otherwise establishing or maintaining a market for the retailer’s products for storage, use or consumption in this state.

1 (3) Any retailer owning or leasing any real or tangible personal property situated
2 in this state.

3 (4) Any retailer for whom a related party pursuant to an agreement with or
4 incooperation with the retailer: (A) owns or leases any real or tangible personal
5 property, or performs services in the state in connection with the sale of [tangible
6 personal property and/or taxable services*] for storage, use or consumption in this state,
7 including, but not limited to, services to design and develop tangible personal
8 property sold by the retailer, the solicitation of sales of tangible personal property
9 on behalf of the retailer; or (B) uses trademarks, service marks, or trade names in
10 this state that are the same or substantially the similar to those used by the retailer.

11 (c)

12 (1) In addition to Subsection (b) above, a retailer who sells [tangible personal property
13 and/or taxable services*] for storage, use, or other consumption in this state shall be
14 presumed to be required to collect the tax levied under this Act if the retailer
15 enters into an agreement, directly or indirectly, with one or more residents of this
16 state under which the resident, for a commission or other consideration based on
17 completed sales, directly or indirectly, refers potential purchasers to the retailer,
18 whether by a link on an internet website, written or oral presentation, or
19 otherwise, and if the cumulative gross receipts from sales by the retailer to
20 purchasers in this state who are referred to the retailer by all residents of this
21 state with such an agreement with the retailer is greater than \$10,000.00 during
22 the immediately preceding 12 months. The presumption created by this
23 Subsection shall not apply if the retailer's total cumulative gross receipts from
24 sales to purchasers in this state do not exceed \$_____during the twelve months
25 immediately preceding the sale. [optional: small seller exception]

26 (2) The presumption created by the operation of Subsection (c)(1) above may
27 be rebutted by proof that the resident with whom the retailer has an
28 agreement did not engage in any solicitation in the state on behalf of the retailer
29 that would be sufficiently connected with this state under the United States

1 Constitution during the same preceding 12 months. Evidence to rebut the
2 presumption may consist of verified written statements from all residents with
3 whom the retailer has an agreement stating that they did not engage in any such
4 solicitation or other activities in this state on behalf of the retailer during the
5 preceding 12 months if the statements are provided and obtained in good faith.

6 (3) An agreement for advertising services with a person or persons in this
7 state, to be delivered on television, radio, in print, on the Internet, or by any
8 similar medium, is not an agreement described in Subsection (c)(1) above, unless
9 the person entering the agreement with the retailer also directly or indirectly
10 solicits potential customers in this state for the retailer through use of flyers,
11 newsletters, telephone calls, electronic mail, blogs, microblogs, social networking
12 sites, or other means of direct or indirect solicitation specifically targeted at
13 potential customers in this state. For purposes of this subsection, an agreement for
14 services based upon commissions or other consideration conditioned upon
15 completed sales in this state is not an agreement for advertising services.

16 (4) This Subsection shall apply without regard to the date the retailer and the
17 resident entered into the agreement described herein.

18 (5) The twelve months before the effective date of this Act are included as part
19 of the preceding twelve (12) months for purposes of this Subsection (c).

20 (d) For purposes of this Section, a retailer and another person are considered related
21 parties if they meet any one of the following tests:

22 (1) the retailer and one or more persons are component members of the same
23 controlled group of corporations under section 1563 of the Internal Revenue Code;
24 or

25 (2) the retailer is a related taxpayer to the other person under the provisions of
26 section 267 of the Internal Revenue Code; or

27 (3) the retailer and the other person is a corporation, limited liability company,

1 partnership, estate, or trust, and such corporation, limited liability company,
2 partnership, estate, or trust and its shareholders, members, partners, or
3 beneficiaries own in the aggregate directly, indirectly, beneficially, or
4 constructively at least 50 percent of the profits, capital, stock, or value of the other
5 entity or both entities.

6 (e) A retailer, whether or not engaged in business in this state or authorized to do
7 business in this state, shall be subject to use tax collection duties in this state if
8 federal law permits this state to impose such duties on the retailer.

9 (f) The definitions in this Section are only applicable to the taxes [^{levied under this Act*}].

10 (g) The provisions of this Section are severable. If any provision of this Section or its
11 application is held invalid, that invalidity shall not affect other provisions or
12 applications that can be given effect without the invalid provision or application.

13 (h) This statute applies to sales for consumption, use or storage in this state made on or
14 after [effective date].

*States can insert language within the brackets to correspond to their particular
taxing schema.